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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Ms. Dortch:

In this letter, El Paso Networks, LLC, ("El Paso") responds to the recent *ex parte* letter in this proceeding from BellSouth concerning the obligation of incumbent local exchange carriers ("ILECs") to provide unbundled access to CMRS cell sites.¹

CLECs Are Eligible to Obtain UNEs To Provide Service to CMRS Customers

In its letter, BellSouth claims, in effect, that the Commission should establish a categorical exclusion from unbundling obligations for service provided to CMRS carriers, whether unbundled access is ordered directly by CMRS providers or by CLECs to serve CMRS providers.² BellSouth contends that the 1996 Act did not intend to encourage CMRS service, and that CMRS providers, and presumably CLECs seeking to provide service to CMRS providers, are not impaired without unbundled access to cell sites.³

The Commission should use this proceeding to definitively reject BellSouth's arguments on this and other points. The 1996 Act could not have been clearer in establishing that ILECs must provide unbundled access "to any telecommunications carrier for provision of a telecommunications service."⁴ There is no exclusion for CMRS service. The Commission in

¹ Letter to Marlene H. Dortch, Secretary from W. W. Jordan, Vice President-Federal Regulatory, BellSouth, CC Docket No. 01-338, filed November 27, 2002 ("BellSouth Letter").

² BellSouth Letter at 7-8.

³ *Id.*

⁴ 47 U.S.C. Section 251(c)(3).

the *Local Competition Order* determined that “[CMRS] carriers meet the definition of a ‘telecommunications carrier’ because they are providers of telecommunications services as defined in the Act and are thus entitled to the benefits of Section 251(c), which includes the right to request interconnection and obtain access to unbundled network elements at any technically feasible point in an incumbent LEC’s network.”⁵ Moreover, the Act was intended to promote a competitive market for telecommunications service generally. There is no basis in the Act or its legislative history supporting a conclusion that the Act was not intended to promote wireless service as a competitive alternative in the local marketplace. In fact, the Act specifically provides that the Commission may determine that wireless providers should be treated as local exchange carriers and subject to all the same obligations as CLECs.⁶ BellSouth’s view also violates the Commission’s longstanding goal of technology neutrality. As the Commission explained in the *Local Competition Order*, “all telecommunications carriers that compete with each other should be treated alike regardless of the technology used.”⁷ It would therefore be absurd to interpret the Commission’s rules, as BellSouth suggests, to preclude unbundling of circuits based on the type of carrier the circuit serves. The Commission should not be favoring one group of local service providers over another based on technology or for any other reason.

El Paso notes that BellSouth refuses apparently even to provide UNE access to a CMRS Mobile Telecommunications Switching Office (“MTSO”). This is completely indefensible because at a minimum the connection between a BellSouth central office and a MTSO is a facility between an “ILEC switch or wire center and a switch or wire center of a requesting carrier.”⁸ In contrast, other carriers including SWBT will provide UNE access to the MTSO, although as described in this letter SWBT’s policy towards providing UNE access to other portions of CMRS networks, specifically cell sites, is totally unsatisfactory. This further demonstrates the unreasonableness of BellSouth’s sweeping denial of UNE access to CMRS networks. Accordingly, the Commission should reject BellSouth’s harmful and anti-competitive position that CMRS providers, and CLECs that provide service to them, are *per se* ineligible for UNE access.

In numerous filings in this docket, El Paso and others have exhaustively explained why CLECs are impaired without unbundled access to high capacity loops and transport and dark fiber.⁹ Essentially, in the vast majority of instances there are no alternatives to the ubiquitous ILEC loop, transport, and dark fiber network facilities. Without access to ILEC network elements, CLECs would be unable to reach their customers or transport traffic. The fact that in some cases the customer being served is a CMRS provider makes absolutely no difference with respect to an impairment analysis. In this connection, it is important for the Commission to understand that the only wireless portion of a CMRS provider’s network is the link from the base

⁵ *Local Competition Order*, 11 FCC Rcd 15989, para. 003 (1996).

⁶ 47 U.S.C. Section 153(26).

⁷ *Local Competition Order* ¶ 993.

⁸ See 47 CFR § 319(d).

⁹ Comments of ALTS, El Paso et al., CC Docket No. 01-338, at 45 – 56.

station to the customers handset.¹⁰ CMRS providers are wholly dependent on wireline networks for connections within their networks between the MTSO and base stations.¹¹ Accordingly, CLECs are impaired without unbundled UNE access to cell sites and the Commission should so find in this proceeding.

**Incumbent LEC Facilities that Serve CMRS Carriers are UNEs
Regardless of Whether the Commission Decides to Define Them as Loops or Transport**

There can be little dispute that the facilities ILECs deploy to serve CMRS carriers are unbundled network elements, either loops or transport. BellSouth's letter fails to address the broader question of whether these circuits are "network elements" that are subject to Section 251(c)(3) of the Act. The answer to that question is "yes."

The definition of "network element" in the Act, and as implemented by the Commission, clearly encompasses the facilities ILECs deploy to provide CMRS carriers with the wireline components of their networks. The 1996 Act defines "network element" as "a facility or equipment used in the provision of telecommunications service."¹² ILEC copper, fiber and equipment connecting a central office to a cellular tower site, or a MTSO are certainly facilities, and are plainly "used in the provision of a telecommunications service." BellSouth does not even attempt to contradict the obvious conclusion that § these facilities are network elements. Instead, it simply ignores the issue.

BellSouth's argument regarding impairment of CMRS carriers is plainly wrong under either a loop or transport unbundling analysis. CMRS carriers face the same impairments CLECs face in obtaining alternative sources of supply for their wireline transport needs. Further, CMRS carriers must have access to a ubiquitous loop and transport network in order to provide market wide coverage that is essential in the CMRS marketplace. There can be no dispute that regardless of whether CMRS carriers are impaired, CLECs are impaired without access to those facilities.

For example, in the Texas markets where El Paso competes to serve CMRS carriers with an alternative to SWBT's transport offerings, a single CMRS carrier may have over 400 cell sites that must be interconnected to its MTSOs in order to provide customers with seamless coverage preventing dropped calls. There is no alternative to the ILEC facilities that serve these locations. CMRS carrier cell site locations are generally spread across a wide geographic area and some loops might be several miles in length making it extremely cost prohibitive for a CLEC (or a CMRS carrier) to deploy its own loop facilities. In fact, the analysis for determining whether CLECs and/or CMRS carriers are impaired without access to ILEC facilities deployed to serve cell sites is no different than analysis for loops in general.

¹⁰ Petition For Declaratory Ruling, AT&T Wireless Services, Inc. and VoiceStream Wireless, Corp., CC Docket No. 96098, filed November 19, 2002, p. 14.

¹¹ *Id.*

¹² 47 U.S.C. § 153(29).

BellSouth's strained interpretations of the Act and Commission rules will impede the development of wholesale competition to the ILECs and the development of CMRS competition as a retail alternative to the ILEC basic local exchange services. As noted, the Act provides that ILECs must provide unbundled access to network elements to "any requesting telecommunications carrier for provision of a telecommunications service."¹³ Wholesale carriers are telecommunications carriers and the services they provide are telecommunications services. BellSouth's interpretation that apparently loops may only be obtained to premises of non-carriers or retail customers could effectively thwart wholesale carriers' ability to provide service.

Further, wholesale services promote the goals of the Act by enabling other carriers to provide competitive wholesale services to retail customers. Therefore, in addition to the fact that there is no basis under the language of the Act for restricting the availability of UNEs to non-carrier premises, the Commission should reject BellSouth's view because of its harmful effect on the wholesale marketplace. In the Notice, the Commission asked for comment on the viability of a third party intramodal wholesale facilities market.¹⁴ El Paso's position in the Texas market demonstrates that such a market is viable if the Commission develops policies that allow such a market to develop.

The Commission should confirm the ILECs' obligation to provide unbundled access to these network elements in its Triennial review proceeding. As the Commission observed in the *UNE Remand Order* wireless technologies, including mobile telephony were not yet "viable alternatives to the incumbent's wireline loop facilities."¹⁵ Of course, if the Commission intends to see that possibility through to its logical conclusion, it must foster the development of a competitive wholesale market for the wireline services on which CMRS carriers rely to provide service to American consumers. If the Commission uses the Triennial Review to preserve the ability of CLECs such as El Paso to use UNEs to develop wholesale competition then that intermodal competition has a chance to become reality. However, if the Commission adopts the exclusionary policies offered by BellSouth it will establish a market where all retail competitors rely on the same wholesale supplier, the ILEC. As the Commission is aware, a competitive wholesale market is critical to the proper functioning of a competitive retail market.

It is not surprising that BellSouth would proffer this view as it seeks to maintain its advantage in the CMRS market. BellSouth through its CMRS affiliate has a distinct advantage in pricing CMRS service because it has access to its own wireline facilities, in effect, at cost, while non-affiliated CMRS carriers must pay retail rates for identical services.

The Commission should not allow ILECs to avoid their statutory obligations to provide unbundled access to facilities that serve CMRS carrier locations. Facilities serving these carrier locations must be available as *some* form of UNE, whether loop or transport.

¹³ 47 U.S.C. Section 251(c)(3).

¹⁴ Notice at ¶ 30.

¹⁵ *UNE Remand Order* 15 FCC Rcd at 3782, ¶ 188.

The Commission Would be Fully Justified in Finding that Cell Sites Are Customer Premises Qualifying for UNE Loops

BellSouth states that CLECs are not eligible to obtain UNE loop access to cell sites because cell sites do not constitute end-user customer premises. Section 51.319(a)(1) of the Commission's rules defines the loop as a transmission facility between a distribution frame in an incumbent LEC central office and the loop demarcation point at "an end-user customer premises."¹⁶

As with its request for a sweeping exclusion from unbundling obligations for CMRS, the Commission should reject this definitional chicanery which is simply designed to define away the ability of carriers to sell loops to other carriers. There is nothing in the language of the Commission's definition of a loop or the *UNE Remand Order*¹⁷ suggesting that loops cannot serve carriers. The Commission's rules should not be read so narrowly to preclude the use of UNE loops to provide wholesale service to carriers simply because they do not meet Bellsouth's threshold for a retail "end user." This distinction makes little sense in the case of CMRS carrier cell sites where the end of the wired portion of the CMRS network is at the cell site. Both legally and technically, the Central Office to cell site circuit is the proverbial "last mile" of the CMRS carriers' national wireline network. For the wholesale CLEC, the cell site is the customer premise. Thus the CO to cell site circuit is the loop, and like very other loop should be available as a UNE allowing the benefits of the 1996 Act to flow to mobile phone consumers.

The existing interpretation of loop offered by BellSouth unnecessarily creates tension with the common carrier obligations of telecommunications carriers. Consider the example of a cell site location that the CMRS carrier also uses for administrative traffic. There is no dispute that when consuming services for its own administrative use that a CMRS carrier is by any retail interpretation an "end user." Thus, BellSouth's interpretation of the UNE loop definition would require that telecommunications carriers such as El Paso investigate how its CMRS customers will use the telecommunications services El Paso provides before ordering the UNEs needed to fulfill the customer's request. The Commission should clarify for the ILECs that these circuits are available as UNEs when requesting telecommunications carriers sell on a wholesale basis to CMRS carriers and that CMRS carriers cannot be relegated to high-priced tariffed rates indefinitely.

The Commission Would be Equally Justified in Finding that Cell Sites Qualify for UNE Transport

Assuming, *arguendo*, that cell sites are not eligible for UNE loop access, which would be incorrect, then cell sites would nonetheless be eligible for UNE transport access. BellSouth contends, however, that it is not obligated to provide UNE transport to CLECs for the purpose of connecting to CMRS cell sites because these transport facilities do not fall within the

¹⁶ 47 C.F.R. Section 51.319(a)(1).

¹⁷ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, released November 5, 1999 ("*UNE Remand Order*").

Commission's current definition of unbundled transport because cell sites do not contain switches. Section 51.319(d)(1)(i) of the Commission's rules provides that interoffice transmission facility network elements include "dedicated transport between wire centers owned by incumbent LECs *or* requesting telecommunications carriers, *or* between switches owned by incumbent LECs or requesting telecommunications carriers."¹⁸ Thus, the FCC rules clearly do not require that a carrier location contain a switch to fall within the ambit of UNE transport. As long as the carrier location is either a switch or wire center it is within the scope of 319(d)(1)(i).

BellSouth's letter utterly fails to address the definition of wire center and instead propagates the fallacy that carrier locations must contain switches in order to fit within the definition of UNE transport. Such a construction of this rule makes no sense for if all wire centers contained switches the Commission's use of the word "or" in 319(d)(1)(i) would be superfluous. As technology continues to change, growing numbers of wire centers have no traditional circuit switches, a requirement often argued for by SBC. Traditional circuit switching is becoming obsolete and increasingly unnecessary for the many different requirements of telecom carriers, and must not be a factor in the availability of transport UNEs.

Despite the fact carrier locations need not contain switches to fall under the definition of UNE transport, cell sites do perform switching functions. As pointed out to the Commission in this proceeding:

CMRS base stations contain sophisticated electronics that, together with other elements of the CMRS network, provide end users with the same, if not greater functionality than wireline end office switches. Without this base station equipment, calls could not be terminated to, or received from, end users.¹⁹

The specific switching functions that base stations perform include transmitting signaling information to the MTSO that registers a mobile customer's location; opening the communications path; and monitoring the quality and signal strength of the call.²⁰ The base station also performs concentration, which is one of the primary functions of a switch.²¹

Moreover, the Commission has recognized that switching functions may be performed other than by traditional circuit switching. For example, the Commission has determined that a paging terminal performs switching, although not circuit switching. The Commission has found that a paging terminal performs switching in that "it receives calls that originate on the LEC's network and transmits the calls from its terminal to the pager of the called party" and "directs the page to an appropriate transmitter in the paging network, and then that transmitter delivers the page to the recipient's paging unit."²² The Commission stated that the paging "terminal and

¹⁸ 47 C.F.R. Section 51.319(d)(1)(i).

¹⁹ Comments of AT&T Wireless Services, Inc., CC Docket No. 01-338, filed April 5, 2002, p. 27.

²⁰ *Id.*

²¹ *Id.* p. 28.

²² *TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCC Rcd 11166 (2000), para. 22. ("TRIS Wireless").

the network thus perform routing or switching and termination”²³ and that this was the “equivalent of what an end office switch does when it transmits a call to the telephone of the called party.”²⁴

The type switching involved in paging is similar to, but actually less than, the switching that is performed by cell sites. While cell sites receive calls originating on the LEC’s network and transmit the calls to the cell phone of the called party, which by itself constitutes switching, CMRS networks do more in that they establish two-way voice connections between the calling and called party, although this requires coordination between central controllers at the MTSO and equipment at the base station.²⁵

Accordingly, BellSouth’s contention that cell sites are not eligible for UNE transport because switching is not performed there is totally invalid. The Commission should determine that cell sites perform switching and, therefore, that transport links to base stations qualify for UNE dedicated transport to cell sites.

To the Extent Necessary the Commission Should Clarify the Definitions of UNE Loops and Transport to Explicitly Encompass Cell Sites

As discussed above, BellSouth’s arguments that CLECs are not eligible to obtain UNE loop or transport access to cell sites because, respectively, cell sites are not end use premises and do not contain switches are invalid. However, to resolve this issue definitively the Commission should clarify its definitions of loops and transport to explicitly provide that ILECs must provide unbundled access to cell sites. The Commission should clarify its definition of loops to provide either that end-user customer premises include cell sites and other wholesale customer (*i.e.* carrier) locations; identify cell sites as a possible termination point for loops; or remove the term “end-user” from the definition. Similarly, the Commission should clarify its definition of interoffice transport UNEs to provide that interoffice transport may be between switches or wire centers owned by ILECs and carrier locations where traffic is aggregated and/or routed such as cell sites. In this proceeding, El Paso has urged the Commission to establish dark fiber as a separate network element.²⁶ The Commission should provide in its definition of dark fiber UNEs that ILECs must provide access to unbundled dark fiber for serving cell sites or other carrier locations including but not limited to MTSOs. These clarifications would facilitate achievement of the pro-competitive goals of the Act by assuring that ILECs may not thwart CLECs’ ability to provide wholesale services to CMRS and other carrier customers.

UNE Access to Cell Sites May Be Judged by SWBT Practices

The eligibility for UNE access to cell sites may be judged to some extent by the prior practice of ILECs. In this connection, SWBT routinely provisioned over several months starting

²³ *Id.*

²⁴ *Id.*

²⁵ Comments of AT&T Wireless Services, Inc., CC Docket No. 01-338, filed April 5, 2002, fn. 76.

²⁶ Reply Comments of El Paso Networks, LLC, CC Docket No. 01-338, filed July 22, 2002.

in May 2002 approximately the first 80 requests of El Paso for UNE loop access to cell sites. These were provisioned as DS-1 loop UNEs ordered under SWBT's mechanized ordering process through Local Service Requests. The fact that SWBT routinely provisioned them and included the cell sites in its mechanized list of customer sites eligible for loops shows that cell sites are, and should be, eligible for UNE loop access. Subsequently, SWBT determined that it would no longer provision UNE requests for cell sites, which, as explained below, is the subject of a proceeding before the Texas Public Utility Commission ("TPUC").

El Paso Has Obtained Temporary Relief in Texas

As part of its apparent change of policy concerning UNE access to cell sites, SWBT initiated in November 2002 a proceeding before the TPUC seeking to prevent El Paso from obtaining UNE access to cell sites. The TPUC granted El Paso's request for interim relief and directed SWBT to continue provisioning DS-1 loop UNEs to cell sites pending further proceedings.²⁷ While this further substantiates that ILECs must provide UNE access to cell sites, this relief at this time is interim in nature. SWBT will continue to vigorously pursue its theory that it is not required to provide UNEs to CLECs seeking to provide service to CMRS providers. Accordingly, El Paso urges the Commission to promptly address this issue and determine that ILECs must provide UNE access to CMRS cell sites.

²⁷ *Complaint of Southwestern Bell Telephone L.P. for Post Interconnection Agreement Dispute Resolution With El Paso Networks, LLC*, Order Granting Interim Relief and Setting Entry for the Procedural Schedule and Protective Order, Order No. 2, Docket No. 26904, Public Utility Commission of Texas, November 22, 2002.

Sincerely,

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